10-11-2013

Robinson v. Mueller Appellant's Reply Brief Dckt. 40866

IN THE SUPREME COURT OF THE STATE OF IDAHO

TWYLLA ROBINSON, Plaintiff-Appellant, vs. CONNIE MUELLER, as Personal Representative of the Estate of Hazel Marquardt, Defendant-Respondent.	)	SUPREME COURT NO. 40866 FIRST DISTRICT COURT, BENEWAH COUNTY CASE No. CV-2011-252

REPLY BRIEF OF APPELLANT

Appeal from The District Court of the First Judicial District
for Benewah County

Honorable Fred M. Gibler,
District Judge, Presiding

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I. ARGUMENT

A. The District Court's Ruling that Marquardt Owed No Duty to Robinson was Clearly Erroneous.

1. Defendant Misinterprets *Harrison v. Taylor.*

The lynch pin of Defendant's argument is the notion that a "tenant steps into the shoes of the landlord" for the purposes of liability to a third party who comes onto the property, citing to the following language from *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989):

> Similarly, a tenant or lessee, having control of the premises is deemed, so far as third parties are concerned, to be the owner, and in case of injury to third parties occasioned by the condition or use of the premises, the general rule is that the tenant or lessee may be liable for failure to keep the premises in repair.

115 Idaho at 596, 768 P.2d at 1329. However, Defendant both misinterprets the language of this Court and takes that statement out of context. Defendant would rewrite the foregoing language to read:

> Similarly, a tenant or lessee *has* control of the premises and *thus* is deemed, so far as third parties are concerned, to be the owner, and in case of injury to third parties occasioned by the condition or use of the premises, the *absolute* rule is that the tenant or lessee *is* liable for failure to keep the premises in repair.

Defendant plucks this sentence out of a paragraph which further reveals the fallacy of Defendant's position:

> [T]here is an additional basis for reversing the ruling of the trial court here. *Either a tenant, or a landlord, or both, may be liable to a third party for injuries resulting from negligent repairs or failure to repair.* Even in the absence of a specific lease provision, and with no controlling statute requiring him to make repairs, if a landlord voluntarily undertakes repairs he is bound to use reasonable and ordinary care or skill in the execution of the work. 49 Am.Jur.2d § 795, p. 746 (see cases cited therein). Similarly, a tenant or lessee, *having control*

> *of the premises* is deemed, so far as third parties are concerned, to be the owner, and in case of injury to third parties occasioned by the condition or use of the premises, the general rule is that the tenant or lessee may be liable for failure to keep the premises in repair.

Id. at 596, 768 P.2d at 1329 (citations and references to the record omitted) (emphasis added). This Court was not fashioning a rule that a "tenant steps into the shoes of the landlord if the tenant is the occupier of the premises and is aware of the alleged dangerous condition." Brief of Respondent, p. 8. Rather, this Court stated (1) that either the tenant or the landlord or both may have liability to third persons depending on who had the responsibility to repair or maintain the premises, and (2) that if a tenant has control of the premises, a tenant may be liable for failure to keep the premises in repair. The matters that remained issues of fact for trial, according to this Court, were whether the landlord or the tenant had responsibility for maintenance of the sidewalk and who had control of the premises. 115 Idaho at 597, 768 P.2d at 1330.

The district court in this case erred in determining as a matter of law that Marquardt had no duty to Robinson in light of *Harrison v. Taylor* and in light of the evidence before the Court. The uncontroverted evidence regarding maintenance and repair of the premises was that in 2008, Marquardt replaced an old, drafty door leading to the second-story deck which had no safety railing. R. p. 70. In addition, the lease between Marquardt and Winkelman, the tenant, said nothing about maintenance of the premises and certainly did not require Winkelman to do any repair or maintenance. R. p. 78. Finally, the record lacks any evidence that Winkelman did any repair or maintenance on the upstairs apartment he rented from Mrs. Marquardt, who lived downstairs. R. p. 35. The inference from this evidence is that Winkelman did not have

responsibility for repair or maintenance of the premises and that the duty to repair and maintain the premises was reserved by Marquardt. Thus, there were issues of fact concerning who had a duty to Robinson that precluded the district court's granting summary judgment.

The district court erred in leap-frogging over genuine issues of material fact that should have been reserved for trial and in adopting wholesale Defendant's argument that only the tenant owes a duty to a third person on the rented premises. A tenant who has control of the premises and who is responsible for maintenance and repair may owe a duty of care to a third party; however, where there are issues of fact with respect to control and responsibility for maintenance and repair of the premises, summary judgment should be denied. "As this Court stated in *Harrison*, '[d]isputes in this area will normally present a jury question under particular facts, unless reasonable minds could not differ.'" *Ball v. City of Blackfoot*, 152 Idaho 673, 676, 273 P.3d 1266, 1269 (2012) (quoting *Harrison v. Taylor*, 115 Idaho at 596, 768 P.2d at 1329)).

B. <u>The District Court Erred in Failing to Consider the General Duty to Exercise Ordinary Care</u>.

The district court failed to address the Plaintiff's argument that every person has a general duty to exercise ordinary care to avoid subjecting others to foreseeable, unreasonable harm. R. pp. 95-102. This was clear error. This Court's decisions have made it clear that premises liability is not the only basis of liability of a property owner to another person. In *Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008), the Court of Appeals pointed this out:

> Our Supreme Court has suggested that premises liability is not the exclusive source of duties where a landowner is involved. Instead, circumstances may give rise to a general duty of care owed to third parties. *See Turpen [v. Granieri]*, 133 Idaho [244, 247-48], 985 P.2d [669, 672-73 (1999)]. As a general principle, every person, in the conduct of his or her business, has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others. *Id.* at 247, 985 P.2d at 672; *Sharp v. W.H. Moore Inc*, 118 Idaho 297, 300, 796, P.2d 506, 509 (1990). However, our Supreme Court has also made clear that not every person or entity owes a tort duty to everyone else in all circumstances. *Turpen*, 133 Idaho at 247-48, 985 P.2d at 672-73.[1]

Boots v. Winters, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008).

Boots v. Winters, like *Turpen v. Granieri*, involved not a condition on the land, but activities on the land. However, *Sharp v. W.H. Moore Inc.* involved an unsafe condition: the third floor fire escape door with an allegedly faulty lock that could be left unlocked. *Sharp*, 118 Idaho 297, 299, 796 P.2d 506, 508 (1990).

In *Sharp*, involving the rape of a tenant's employee at work, the Court posited the general duty to exercise ordinary care as "another reason" for finding a duty of care to exist in that case:

> Another reason for finding a duty of care to exist in this case is the general rule that each person has a duty of care to prevent unreasonable, foreseeable risks of harm to others. *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); *Harper v. Hoffman*, 95 Idaho 933, 523 P.2d 536 (1974).
>
> > Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services *or use his property* as to avoid such injury. [Citations omitted.] The degree of care to be exercised must be commensurate with the danger or hazard connected with the activity. [Citations omitted.]

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[1] The Supreme Court in *Turpen* noted that the landlord's "only ability to prevent the harm"—the death of a college student from alcohol poisoning while attending a party at the rented premises—"would be by refusing to rent the premises at all. The Court thus held that the landlord had "no duty under the very limited facts presented here." *Turpen*, 133 Idaho at 248, 985 P.2d at 673.

> *Whitt v. Jarnagin*, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966). Whether the duty attaches is largely a question for the trier of fact as to the foreseeability of the risk.

Sharp v. W.H. Moore, 118 Idaho at 300, 796 P.2d at 509 (emphasis added).

The Court stated that foreseeability is a flexible concept that varies with the circumstances of each case. "Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor, but the burden of preventing such injury is high, a higher degree of foreseeability may be required." *Id.* (citing *U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Learned Hand); *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653, 658 (1985)).

Defendant contends that Robinson's position would render premises liability law meaningless. Defendant argues that this Court's discussion of the balancing of the harm approach in *Sharp* was simply an "analogy to establish why a landlord owes an invitee a duty of reasonable care." Brief of Respondent at 16. The fallacy of Defendant's arguments concerning *Sharp* is readily apparent in the language employed in *Sharp*. First, in *Sharp* this Court did not base liability on premises liability and the status of the Plaintiff as an invitee. In fact, this Court stated: "The question of whether a landlord owes a duty of reasonable care to the tenants of the property was settled by our recent decision in *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984)." *Sharp*, 118 Idaho at 300, 796 P.2d at 509. Second, this Court in *Sharp* stated that "in addition to the clear rule of *Stephens*," the general rule of liability was "another reason for finding a duty of care." *Id.*

Defendant also maintains that the general rule of liability is not applicable because the duties owed to invitees, licensees and trespassers have been defined. This argument is not supported by *Sharp*, in which this Court offered the general duty of care as an additional basis for liability. It is not supported by the language of any of the cases discussing the general duty of care. This duty is described by the Courts as owed by all persons. *Turpen v. Granieri*, 133 Idaho, 244, 248, 985 P.2d 669, 673 (1999); *Sharp v. W.H. Moore*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990); *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980); *Harper v. Hoffman*, 95 Idaho 933, 935, 523 P.2d 536, 538 (1974); *Whitt v. Jarnagin*, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966); *Boots v. Winters*, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008).

The duty is based on foreseeability and a balancing of the harm. As stated in Robinson's main brief, when a second-story deck (or recessed dormer or patio) is accessed by a door in the apartment and the deck does not have a protective railing surrounding it; it is foreseeable that harm may result from the lack of a railing. Moreover, unlike the defendant in *Turpen*, Marquardt had the ability to take reasonable steps to prevent the foreseeable risk of harm inexpensively. She only had to install a protective railing around the deck.

The Court of Appeals in *Boots v. Winters* pointed out that balancing of the harm is engaged in only in the rare circumstances when a court is called on to extend a duty beyond its previously recognized scope or when a duty has not previously been recognized. Robinson seeks recognition that the landlord's duty of reasonable care under the circumstances to tenants extends to the tenant's guests either directly through *Stephens* or through an extension of the

Stephens rule; thus, it is appropriate to consider the general duty to exercise reasonable care as an additional basis for liability.

C. The Defendant Misinterprets *Stephens v. Stearns*.

Ignoring the agrarian-based feudal genesis of landlord immunity for dangerous conditions on the land, Defendant argues that the Court in *Stephens* and in *Sharp* "simply expanded the definition of an invitee to include the tenant of a landlord, but did not include guests of tenants." Brief of Respondent at 11. For several reasons, Defendant is incorrect. First, the Court did not use a premises liability/invitee analysis in either case. As set forth above, this Court in *Sharp* stated that "[t]he question of whether a landlord owes a duty of reasonable care to the tenants of the property was settled by our recent decision in *Stephens v. Stearns*." *Sharp*, 118 Idaho at 300, 796 P.2d at 509.

The concurring opinion in *Marcher v. Butler*, cited with approval by the majority in *Harrison v. Taylor*, pointed out that the decision in *Stephens* did not employ the invitee/licensee/ trespasser analysis used in premises liability cases:

> In *Stephens v. Stearns, supra,* we held that the measure of a landlord's duty is not determined under trespasser-licensee-invitee analysis, but rather, "A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." *Id.*, at 258, 678 P.2d at 50, *quoting Sargent v. Ross,* 113 N.S. 388, 308 A.2d 528, 534 (1973). The landlord's duty to exercise reasonable care in light of all the circumstances extends to his or her tenant *or anyone on the premises with the tenant's consent. Pagelsdorf v. Safeco Ins. Co. of America,* 91 Wis.2d 734, 284 N.W.2d 55, 61 (1973).

Marcher, 113 Idaho at 872, 749 P.2d at 491 (Bistline and Huntley, JJ., concurring) (emphasis added).

Second, the injured parties in *Stephens* and *Sharp* were tenants, so liability to tenants' guests was not an issue in either case. However, extending a landlord's duty of reasonable care to tenant's guests was not excluded by the Court in either case and neither case stated that its holding was expressly limited to tenants.

Third, this Court in *Stephens* comprehensively eliminated landlord immunity. Quoting with approval from *Sargent v. Ross*, it simply held landlords to a standard of reasonable care under *all* (not just *the*) circumstances:

> "We thus bring up to date the other half of landlord-tenant law. Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm . . . . A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk."

Stephens, 106 Idaho at 258, 678 P.2d at 50 (quoting *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528, 534 (1973)). And the *Stephens* Court did not simply quote this language from *Sargent v.* Ross. It also held: "[W]e today decide to leave the common-law rule and its exceptions behind, and we adopt the rule that a landlord is under a duty to exercise reasonable care in light of all the circumstances." *Stephens,* 106 Idaho at 258, 678 P.2d at 50. Thus, when Defendant points out that Robinson reads *Stephens* to hold landlords to a reasonable care standard under *all* circumstances, Defendant is correct.

Defendant also grumbles that Robinson cites to out-of-jurisdiction cases in support of her arguments. It is an odd complaint given that most of the out-of-jurisdiction cases Robinson cites in her brief are cases this Court relied on in *Stephens* in eliminating the outdated and unfair system of landlord immunity for dangerous conditions on the rented premises.[2]

Robinson cautions the Court against being led astray, as the district court was, by Defendant's improper superimposing of premises liability, with its emphasis on the status of entrants on the land, on landlord liability. These are different theories of liability and are not to be muddled together. Defendant argues, for example, that because *Stephens* did not concern a tenant's guest, tenant's guests, as licensees, are only owed a duty to warn. This is a prime example of how Defendant muddles the two theories of liability. As set forth in Robinson's main brief, in *Pagelsdorf v. Safeco Ins. Co. of America*, 91 Wis. 2d 734, 284 N.W. 2d 55 (1979), the landlord (Mahnke) and the tenant's guest (Pagelsdorf), agreed that the extent of Mahnke's duty to Pagelsdorf turned on whether Pagelsdorf was an invitee or licensee. The Supreme Court of Wisconsin disagreed, noting that under the common law, when property was leased, the

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[2] With the exception of *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653 (1985), and *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), discussing balancing of harm, the other out of jurisdiction cases were cited in *Stephens*, or in cases relied on by this Court in *Stephens*. *See Stephens*, 106 Idaho at 258, 678 P.2d at 50, wherein the Court stated that several states in addition to Tennessee and New Hampshire had judicially adopted a reasonableness duty of care for landlords, citing to *Pagelsdorf v. Safeco Ins. Co. of America*, 91 Wis. 2d 734, 284 N.W. 2d 55 (1979), and *Young v. Garwacki*, 380 Mass. 162, 402 N.E. 2d 1045 (1980), among many other cases. *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973), and *Wilcox v. Hines*, 100 Tenn. 538, 46 S.W. 297 (1898), were discussed at length and relied on by this Court in *Stephens*, 106 Idaho at 257-58, 678 P.2d at 49-50. *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971), was quoted by *Sargent v. Ross*, 113 N.H. at 399, 308 A. 2d at 535. *Antoniewicz v. Reszczynski*, 70 Wis. 2d 836, 236 N.W. 2d 1 (1975), was discussed by the Wisconsin Supreme Court in *Pagelsdorf*, 91 Wis. 2d at 739-41, 284 N.W. 2d at 558-59.

landlord was not liable for injuries to his tenants *or their guests* resulting from defects in the premises, unless certain exceptions applied. *Pagelsdorf,* 91 Wis. 2d at 739-41, 284 N.W. 2d at 558-59. In other words, the premises liability distinctions between invitee and licensee were not part of the old landlord *immunity* analysis. The landlord did not have a duty to anyone, absent certain exceptions.

That the two theories should not be confused is further supported by *Marcher v. Butler* in pointing out that in *Stephens* the measure of a landlord's duty was not determined under trespasser-licensee-invitee analysis. *Marcher,* 113 Idaho at 872, 749 P.2d at 491 (Bistline and Huntley, JJ., concurring). *See also Harrison v.* Taylor, 115 Idaho 588, 593-94,768 P.2d 1321, 1326-27 (1989) ("The trial court's reliance upon the traditional law pertaining to invitees was misplaced. The test is one of reasonableness under all the circumstances, not one of hidden or obvious dangers, or exceptions to the traditional general rule of non-liability for landlords.) (quoting *Marcher v. Butler*, 113 Idaho at 872, 749 P.2d at 491 (Bistline and Huntley, JJ., concurring)).

Defendant's analysis demotes *Stephens v. Stearns* to a mere anomaly. Her analysis ignores the language employed and the cases relied on by the Court. If this Court intended landlords to have the same duties as owners/occupants under a premises liability theory, it would have said so. If this Court intended that the focus of the analysis for landlords is the status of the person coming onto the leased premises, surely it would have said so. Instead, the Court adopted the rule that a landlord is under a duty to exercise reasonable care *in light of all* the circumstances. *Stephens,* 106 Idaho at 258, 678 P.2d at 50. Arguably, "all circumstances"

include injuries suffered by a tenant's guest due to a dangerous condition on the premises. Instead, this Court quoted with approval the mandate that a landlord must "act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." *Stephens*, 106 Idaho at 258, 678 P.2d at 50 (quoting *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528, 534 (1973)).

D. Defendant is Not Entitled to Attorney's Fees.

The trial court ruled as a matter of law that Marquardt owed no duty to Robinson. Even if Defendant's analysis and arguments concerning *Stephens v. Stearns* vis-à-vis tenant's guests is correct, and even if her analysis of the general duty to exercise reasonable care is correct, the district court nevertheless ignored issues of fact with respect to the duty to maintain and repair the premises and thus who had control of the premises, and accordingly a duty to warn Robinson. On that basis alone, summary judgment was inappropriate. Moreover, Robinson is not asking this Court to second-guess the district court's legal rulings. Rather, Robinson is asking this Court to give no deference to the trial court's legal rulings and to establish that *Stephens v. Stearns* indeed applies to a tenant's guests, something the district expressly declined to do. R. p. 99. Robinson is asking this Court to hold that an additional reason for reversing is that Marquardt also had a general duty to use her property in such as way as to avoid subjecting others, including Robinson, to an unreasonable risk of foreseeable harm. Robinson is basing her arguments for an extension or declaration of the law on this Court's prior decision in *Stephens* which has not been overturned, and on *Sharp*, which has also not been overturned. Accordingly,

this appeal has a strong basis in the law and was not brought frivolously. Defendant's request for attorney's fees should be denied.

II. CONCLUSION

There is nothing frightening or extraordinary about the landlord duty to exercise reasonable care under all of the circumstances. It is the standard of care by which we all order our conduct so as to avoid subjecting others to unreasonable risks of foreseeable harm. It does not sentence a landlord to strict liability, nor does it require a landlord to take every possible precaution. It only requires reasonableness. Recognizing or extending this standard of care of landlords to their tenant's guests also serves the public policy of requiring landlords to provide reasonably safe premises. It serves the purpose of encouraging reasonable repair and maintenance of rental premises. Robinson respectfully requests the Court to reverse summary judgment, ruling that landlords are held to a standard of reasonable care under all the circumstances, including toward the guests of a landlord's tenants.

Respectfully submitted this 9th day of October, 2013.

JAMES, VERNON & WEEKS, P.A.

Cynthia K.C. Meyer
Attorney for Plaintiff Twylla Robinson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of October, 2013, I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT by the method indicated below, and addressed to counsel of record as follows:

Michael Haman 923 N. 3rd Street Coeur d'Alene, Idaho 83814 Facsimile: (208) 676-1683	___ by U.S. Mail ___ by facsimile ___ by overnight service: _____ X by hand delivery

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